Supreme Court, U.S.
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No. 79-1250

IN THE

Supreme Court of the United States

October Term, 1979

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

ASHLAND OIL, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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1. The Government says it is reluctant to ask the Court to grant the petition because of the past denials of petitions raising the same question. (*Id.*) Ashland in its brief in opposition belabors the prior denials.

The prior denials are a fact.* In our petition we did not attempt to disguise or hide the fact. We there said that, if the prior denials were to any extent the function of a belief that the question as presented in petitions addressed to interlocutory judgments might disappear after the remands, there is no longer ground for such a belief. And we stated our conviction that the question has grown in importance since the first denial of certiorari in the *Grounds* case and even since the petitions of Phillips and the Government for review of an interlocutory judgment in this case were denied in 1977. The growth in importance of the question results, in our view, from the increasingly stringent standards applied by this Court in recent terms in deciding whether a federal statute creates a private cause of action in derogation of generally applicable state law; the effect of the court of appeals' interpretation of Section 11 of the Helium Act and the Natural Gas Act is analogous to the creation of a private right of action. (Pet. 17-20.) We reply to Ashland's contrary argument on that score after we respond to the other reasons the Government gives for not supporting Phillips' petition.

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*The prior denials are clearly not a bar to a present grant of certiorari. (See Pet. 20-21.) Ashland does not, because it cannot, say that they are, though it attempts to insinuate as much. (Ashland Br. in Opp. 3-4, 15.) The statement that "jurisdiction of Phillips' petition . . . rests on very thin ice" (*id.* at 5-6 n.2) is just rhetoric. There is no doubt that Phillips has raised and preserved the issue it poses here and has presented it in a timely-filed petition addressed to the first final judgment of the court of appeals that raises the issue. The Government, watchdog of the gates to this Court, raises no question concerning jurisdiction.

2. The Government says that apparently the trial court decision now affirmed by the court of appeals will have little if any financial impact on it. (U.S. Resp. 13.) It is true that the district court's assessment of the wellhead value of helium was more realistic on the remand than on the original trial. Ashland's windfall and conversely Phillips' liability in this case have been substantially reduced as a result. Nevertheless, as the Government also remarks, "Phillips and others are exposed to large claims. . . ." (*Id.*). That is indeed the fact. The large pending claims underscore the importance of the question presented here. Phillips, which has a large immediate liability to satisfy even on the reduced judgment in this case, is faced with claims involving much larger volumes of helium in pending state court proceedings. In each of those cases, the threshold issue is whether federal statutes are to be interpreted to relieve one party to a contract of its obligation thereunder and allow it to recover as if it had never contracted to sell the commodity in question. This Court and not the court of appeals is the proper court to decide whether federal statutes do indeed intrude so deeply into matters of state contract law. The omnibus *Grounds* case, involving even larger potential claims, remains pending in the court of appeals, the outcome uncertain but dependent ultimately on the resolution of the fundamental issue posed here.

3. The Government acknowledges that, despite its relatively small financial interest in this case as it has finally been decided, the decision below threatens to frustrate a broader national interest. The interest is in the conservation of helium. The Government says that Phillips and other companies "may be deterred from conserving helium if the judgment below stands." (*Id.*) The point is a significant one, and it is underplayed by the Government. Conservation of helium *is* being deterred by uncertainty, in-

duced by the judgment below and the interlocutory decisions in the pending *Grounds* case, as to whether the prospective conserver will have to pay for any helium it places in storage some amount in addition to what it has contracted to pay for natural gas including helium. Writing in *Science* for December 7, 1979, on the "Helium Question," Professor Earl Cook of Texas A. & M. alluded to the original judgment in this case and said that at $17 per mcf it could, if sustained, "constitute a major impediment to helium conservation." The size of the judgment has been reduced, but Professor Cook's concern was more general. "At present, any helium extracted and put in storage carries with it the risk of substantial but unknown future payments to landowners and natural gas producers." P. 1146.

The Government unfortunately misconceives and therefore mistakenly belittles the nature of the deterrent to conservation that Professor Cook has described. The Government says that, "so long as the formula approved by the court of appeals permits the extracting firms to earn a fair return, it is not clear that the conservation program is imperiled." (U.S. Resp. 13.) Whatever "formula" for pricing helium at the wellhead was "approved by the court of appeals" in this case or might be approved by it in some other case cannot have more than an accidental relationship to a fair return for a firm considering now whether to store helium for sale to unknown others in the distant future. No formula can be responsive to that firm's problem. That firm must estimate the price that its helium will bring in the future and the capital costs and direct storage costs of holding the helium until it is sold; its calculations of whether helium storage will yield a profit, difficult enough at best, becomes impossible if it does not even know the basic cost of acquiring the helium it is proposing to store. It cannot know that basic cost figure if it is subject to a

quantum meruit lawsuit, in which it risks being made to pay for helium at the wellhead an amount related to some current estimate of the going price of extracted crude helium or refined helium or whatever. Any "formula" by which a court determines a wellhead price on that basis will have no relationship except by accident to the firm's return on the helium it may store.

4. Ashland argues that the analogy we have drawn between this case and the private right of action cases of this term and last is a false analogy. The most succinct statement of its argument is this: "The federal statutes merely confine natural gas rates to the natural gas, and provide that these rates do not apply to provide payment for commingled helium." (Ashland Br. in Opp. 16.) That formulation masks the nature of the transaction, the terms of the federal statutes involved and how far the court of appeals has extrapolated from their terms. We summarize: Ashland contracted to sell natural gas to Phillips at certain prices. The contracts covered the helium component of the natural gas. When producer prices of natural gas came under federal regulation, the contracts were filed with the Federal Power Commission under provisions of the Natural Gas Act. The contracts have since continued to be given effect according to their terms, except when Ashland did not make a required filing with the FPC; otherwise the FPC has not manifested the slightest interest in them. Section 11 of the Helium Act was enacted after the contracts were filed with the FPC. It stated that the Natural Gas Act was not applicable to sales of helium – in other words, that the FPC could not control the price of helium. On the interpretation adopted by the courts of appeals, Section 11 (read with emanations from the Natural Gas Act) means vastly more than what it says. It means that, where parties have agreed on a price for helium and there has not been the least attempt by the FPC to coerce or regulate the price

under the Natural Gas Act, a party is free to ignore this agreed price and collect an additional amount for the helium by way of quantum meruit. The federal statute is given that effect even though under the applicable state law there can be no quantum meruit recovery where a matter is covered by an express contract.

Giving that effect to a federal statute whose command seemingly runs only to the agency that administers the Natural Gas Act is, we submit, analogous to reading into a federal statute a federal private right of action that does not appear on its face. It opens the way for a recovery in derogation of state law, which would hold the parties to their contract. Despite Ashland's contrary protestations, the analogy holds regardless whether, once the party is free of the obligations of the contract it willingly entered into and the way to recovery is thus opened, the quantum meruit recovery itself is measured according to state law or according to federal law. Our argument does not depend on whether the workback valuation method is a creature of state or federal law.

In that regard, Ashland now says that the quantum meruit law that was applied was state law. (Ashland Br. in Opp. 15-16 & n.7.) The court of appeals has never said so. Ashland has never said so before. The proposition seems unlikely. The en banc opinion of the court of appeals emphasizes federal law and the reasons why it was being applied to "peripheral issues" (*id.* at 14 n.5) such as prejudgment interest. (Pet. App. 35a-41a.) Taking the court of appeals' view, no reason suggests itself why the central issue in the case, the valuation issue, should have been treated differently from those other issues. The apparent application of federal law by the court of appeals in assigning a quantum meruit value to the helium is further reason for

granting the petition because it results in an even deeper intrusion into matters of state concern.

Respectfully submitted,

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